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CHARLES ELMO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 568

UNITED STATES OF AMERICA

v.

SWIFT & COMPANY, *et al.*

No. 569

AMERICAN WHOLESALE GROCERS ASSOCIATION

v.

SWIFT & COMPANY, *et al.*

No. 570

NATIONAL WHOLESALE GROCERS ASSOCIATION

v.

SWIFT & COMPANY, *et al.*

BRIEF OF INTERVENER-APPELLANT NATIONAL WHOLESALE GROCERS ASSOCIATION.

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February 8, 1932.

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Supreme Court of the United States

OCTOBER TERM, 1931.

No. 570.

NATIONAL WHOLESALE GROCERS' ASSOCIATION,
Appellant,

against

SWIFT & COMPANY, *et al.*,
Respondents.

BRIEF IN BEHALF OF INTERVENER-APPELLANT NATIONAL WHOLESALE GROCERS' ASSOCIATION.

Statement.

On February 27, 1920, a decree was entered in the Supreme Court of the District of Columbia in an equity suit brought by the United States Government under the anti-trust laws against the so-called "Big Five Packers" (R. 153).

Nearly five years thereafter two of the defendants, Swift & Company and Armour & Company, filed motions to vacate the decree as invalid and on March 19, 1928 this Court in *Swift & Company* vs. *United States*, 276 U. S. 311, held that the decree was in all respects valid.

On April 16, 1929 the decree again came before this Court on a writ of certiorari to determine the correctness of the decision of the court below in suspending operation

of the decree. This court, on May 20, 1929, in *United States v. California Cooperative Canneries*, 279 U. S. 553, held such suspension improper and reversed the decree below, stating at page 559:

> "When our opinion in the *Swift* case settled that by reason of the Expediting Act the Court of Appeals was without jurisdiction of an appeal in a suit in equity under the Anti-Trust Act in which the United States is the complainant and that the consent decree is valid, *all obstacles to the enforcement of the consent decree should have been promptly removed.* In refusing to vacate its judgment and mandate the Court of Appeals departed from the limits of admissible discretion." (Italics ours.)

Obstacles again have been interposed. On January 31, 1931, upon the petitions of the Swift and Armour defendants *and without the consent of the Government*, the Supreme Court of the District of Columbia entered the decree now appealed from (R. 1060, 1062). This decree modifies the original consent decree so as to permit the defendants to manufacture, sell and distribute, and use their distributive facilities for the sale and distribution, *at wholesale*, of the commodities specified in paragraphs Fourth and Fifth of said consent decree (R. 1060-2).

The Consent Decree of February 27, 1920 was entered *upon the written consents* of one hundred thirty-five (135) defendants representing five (5) groups of packers, Swift, Armour, Cudahy, Wilson and Morris.

The events leading up to the entry of that decree are for the most part recorded in the documents marshalled by this Court in its opinion in *Swift & Co. v. United States*, 276 U. S. 311, at page 319, and for convenience are summarized in an appendix to this brief (*post*, p. 51).

By an order of the Supreme Court of the District of Columbia, entered November 5, 1921 (R. 188), this appellant was granted leave to intervene for the purpose and to the extent of being heard

> "in opposition to any proposed change in the consent decree which would deprive the interveners of the protection now secured by said decree" (R. 188).

Since the entry of said order this appellant has actively supported the Government in resisting the various efforts of the Packers to evade and nullify the consent decree during the twelve years that have elapsed since its entry. A brief résumé of those efforts is given in Point II (*post*, p. 16).

The modification of the original decree deprives this appellant of all the protection secured to it by said decree. From the order providing for such modification this intervener has been allowed an appeal (R. 1137). It is well established that one who has been so permitted to intervene for the protection of his own interests is entitled to appeal from a decree adverse thereto.

> *Ex parte* Jordan, 94 U. S. 248;
> Williams *v.* Morgan, 111 U. S. 684;
> Continental Ins. Co. *v.* United States, *et al.*, 259 U. S. 156;
> *In re* Michigan Cent. R. Co., 124 Fed. 727 (C. C. A., 6th Circ.);
> Hamlin *v.* Toledo, etc. R. Co., 78 Fed. 664 (C. C. A., 6th Circ.).

In *U. S.* v. *California Cooperative Canneries*, 279 U. S. 553, 559, this Court said:

> "In suits in equity brought by the United States under the Anti-Trust Act, an appeal by one who was permitted to intervene, like an appeal by one of the original parties, must be taken direct to this court."

It is not the purpose of this brief to duplicate the arguments of the Government or to summarize all of the evidence presented below. We shall confine ourselves to the following four points (the first two of which are not advanced in the Government's brief) and in each of them shall consider such of the facts only as are necessary to its development:

1. The consent decree being an agreement of the parties and not an adjudication by the court, the court below had no power to modify it without the consent of the Government, which was expressly withheld.

2. Swift and Armour, because of their unconscionable and contumacious conduct with respect to the consent decree, have no standing to obtain relief from a court of equity against the restraints of that decree.

3. The considerations presented by the bulk of the evidence are for Congress and not for the courts, viz.: (1) that Swift and Armour are actuated by good intentions; (2) that modification will benefit the public and relieve petitioners of alleged inconvenience and hardship, and (3) that the existing anti-trust laws are unwise.

4. The petitioners failed to sustain their burden of showing that conditions had so changed since the entry of the consent decree as to justify the modification made by the court below and that, if given the right to engage in the manufacture and wholesaling of groceries, they would not constitute a renewed threat of "the long feared monopoly in meat and other food products", to prevent which the consent decree was entered under the anti-trust laws.

Specification of Errors.

We specify and urge all of the errors assigned by this appellant. These are set forth in full on pages 1122 to 1125 of the record.

We particularly urge:

(a) "The Supreme Court of the District of Columbia erred in making and entering the decree herein of January 31, 1931, modifying the consent decree entered in this cause on the 27th day of February, 1920."

(b) "The Court erred in modifying said consent decree without the consent of the United States of America and of all the parties to said decree."

(c) "The Court erred in not dismissing the amended petitions of the defendants herein for lack of equity, and particularly by reason of the failure of the petitioning defendants to comply with the said consent decree and their efforts from the time of its entry, February 27, 1920, to evade or defeat it."

(d) "The Court erred in not finding and deciding that there is danger of monopoly and of restraint of interstate trade and commerce by and on the part of the defendants."

(e) "The Court erred in deciding that the testimony or other evidence in this case showed such changes in conditions since the entry of said consent decree of 1920 as to justify the modification thereof." (R. 1123.)

ARGUMENT.

I.

The Consent Decree was not an adjudication by the Court but a contract between the Government and the Packers, and the Court had no power to modify the contract in any material respect without the consent of the Government. That consent having been expressly withheld, the refusal to dismiss the petitions was error.

This point was preserved in the court below both by motion to dismiss the amended petitions (R. 315, 316, 382) and by objections to the admission of evidence (R. 383, 384-6), and the rulings of the court thereon are duly assigned as error (R. 1123).

The Government expressly refused to consent to any modification of the consent decree. The Attorney-General, in his letter to the Senate dated July 11, 1930, said (italics ours):

> "With respect to the attitude of this Department toward the petitions of Armour & Company and Swift & Company for modification of the consent decree, *I have declined to entertain any suggestion that I stipulate for any modification of this decree* * * *" (R. 387-8).

The court below found that it had "inherent power" to modify the consent decree "in such respects as the Court find justified in the public interest and in justice to the defendants" (Conclusion of Law, No. 3; R. 1114); and that "The consent of the United States and all other original parties who consented to the entry of said Decree is not necessary to the exercise of the Court's aforementioned power to modify" (Conclusion of Law, No. 4; R. 1114). It

is also found that Paragraph Eighteenth of the Consent Decree reserved to the court power to make such modification (Conclusion of Law, No. 2; R. 1114) and that said paragraph constituted "consent by all of the parties that the Court may entertain at any time any application for modification of the Decree and enter its order thereon" (Conclusion of Law, No. 5; R. 1114).

With the greatest deference to the court below, we submit that no support for his view is found in the decided cases. On the contrary, the authorities always and everywhere have held that a consent decree is not an adjudication but is a contract of the parties, and must be construed as a contract.

Lawrence Mfg. Co. *v.* Janesville Cotton Mills, 138 U. S. 552, 562;

Hodgson *v.* Vroom, 266 Fed. 267, 268 (C. C. A., 2d Circ.);

Wilson *v.* Haber Bros., 275 Fed. 346 (C. C. A., 2d Circ.);

Garrett & Co. *v.* Sweet Valley Wine Co., 251 Fed. 371 (D. C. Ohio);

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Paine *v.* Doughty, 251 Ill. 396, 400;

Hohenadel *v.* Steele, 237 Ill. 229, 234;

Karnes *v.* Black, 185 Ky. 410, 414;

New York Cent., etc., R. Co. *v.* T. Stuart & Son Co., 260 Mass. 242, 248;

Cutter *v.* Arlington Casket Co., 255 Mass. 52, 62;

Cox *v.* Albemarle Drainage Dist., 195 N. C. 264, 267;

Ellis *v.* Ellis, 193 N. C. 216;

Southern Distrib. Co. *v.* Carraway, 189 N. C. 420, 423;
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Stites *v.* McGee, 37 Oreg. 574;
Allen *v.* Richardson, 9 Rich. Eq. (S. C.) 53;
Tyner *v.* City of Port Arthur, 115 Tex. 310, 319;
Barnes *v.* Amer. Fertilizer Co., 144 Va. 692, 720;
2 Street, Fed. Eq. Pr., Sec. 1957;
Gibson, Suits in Chancery, Sec. 577;
5 Enc. of Pl. & Pr. 961-2;
21 Corpus Juris 815.

"The prior decree was the consequence of the consent and not of the judgment of the court."

Lawrence Mfg. Co. *v.* Janesville Cotton Mills, 138 U. S. 552, 562.

In *Hodgson* v. *Vroom,* 266 Fed. 267, 268, the Circuit Court of Appeals, Second Circuit, said *per* Hough, J.:

"The distinction between a decree in common form and a consent decree is the difference between a consent to submit a case to the court for decision and a consent as to what the decision shall be. When there is a consent as to what the decision shall be, the decree is 'a mere agreement of the parties under the sanction of the court, and is to be interpreted as an agreement'."

In *United States* v. *Irwin,* 127 U. S. 125, 129, the Court, in construing the phrase, "for adjudication according to law", said (italics ours):

"The force of this phrase cannot be satisfied by anything less than a formal, regular and final judgment of the judicial tribunal to which the matter is

submitted, *acting upon the acknowledged principles of law applicable to the circumstances of the case.*"

In *People* v. *Sohmer,* 207 N. Y. 450, 459, the court said:

"An adjudication involves the exercise of judicial power through a hearing upon an issue, the receiving and weighing of evidence and the act of rendering judgment."

It is also held with equal unanimity that, in the absence of a provision in the consent decree giving the court discretionary power to modify it, the court has no power to grant any material modification except upon the consent of all the parties who made the agreement which is embodied in the consent decree.

City of Des Moines *v.* Des Moines Water Co., 218 Fed. 939, 943; affirmed 230 Fed. 570;
Karnes *v.* Black, 185 Ky. 410, 414-5;
Horning *v.* Saginaw Circ. Judge, 161 Mich. 413;
Lentz *v.* Lentz, 194 N. C. 673;
First Nat. Bank *v.* Mitchell, 191 N. C. 190, 193;
Bank of Glade Spring *v.* McEwen, 160 N. C. 414;
Edney *v.* Edney, 81 N. C. 1;
Stites *v.* McGee, 37 Oreg. 574;
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2 Street Fed. Eq. Prac., Sec. 2082;
Gibson, Suits in Chancery, Sec. 577;
2 Beach, Mod. Eq. Prac., Sec. 795;
5 Enc. of Pl. & Pr. 961;
12 Corpus Juris 520.

"The agreements of the parties were reciprocal, and each was the consideration for the other. *If you take out what hurts the said defendants, what is left is not what was agreed to.*" (Italics ours.)

Bank of Glade Spring *v.* McEwen, *supra.*

"A decree by consent as such must stand and operate as an entirety or be vacated altogether, unless the parties by a like consent shall agree upon and incorporate into it an alteration or modification. *If a clause be stricken out against the will of a party, then it is no longer a consent decree, nor is it a decree of the court, for the court never made it.*" (Italics ours.)

Edney *v.* Edney, *supra.*

It would seem quite plain, therefore, that the court below lacked power to modify the Consent Decree without the contemporaneous consent of the Government, unless such power was conferred upon it in advance by the final clause of the decree, reserving jurisdiction for certain purposes. Even if that decree had been an adjudication by the court, made after protracted litigation, the court would have had no power eleven years later, and after the decree had been held by this Court to be valid and binding (*Swift & Co.* v. *United States*, 276 U. S. 311), to modify it drastically upon petition, unless such power had been expressly reserved in the decree.

Bronson *v.* Schulten, 104 U. S. 410, 415.

Nor would it help in the present case to regard the petitions of the defendants as bills of review, because a bill of review does not lie to review a consent decree except for fraud, mistake or lack of formal consent. "It is a general rule that against such a decree a bill of review will not lie."

Thompson *v.* Maxwell, 95 U. S. 391, 397.

See also—

Swift & Co. *v.* United States, 276 U. S. 311, 324.

The power to modify without the consent of the Government, if it exists at all, must be found in the "Eighteenth" clause of the Consent Decree which provides (R. 167):

> "That jurisdiction of this cause be, and is hereby, retained by this court for the purpose of taking such other action or adding at the foot of this decree such other relief, if any, as may become necessary or appropriate for the carrying out and enforcement of this decree and for the purpose of entertaining at any time hereafter any application which the parties may make with respect to this decree."

That provision, it will be observed, retains jurisdiction for two specified purposes:

1. For taking such action "as may become necessary or appropriate for the *carrying out and enforcement*" of the decree.

2. For "entertaining" applications which "*the parties*" may make with respect to the decree.

By no stretch of the imagination can the modification of the Consent Decree made by the court below be regarded as "necessary or appropriate for the carrying out and enforcement" of that decree.

Eureka Fire Hose Co. *v.* Eureka Rubber Mfg. Co., 72 N. J. Eq. 555;
Stout *v.* Stout, 104 Va. 480.

In *City of Des Moines* v. *Des Moines Water Co.*, 218 Fed. 939 (affirmed 230 Fed. 570), the court, speaking of the power to modify a consent decree, said at page 943:

> "While the court, upon application of either party, may give such further directions as shall become necessary for the purpose of carrying such order or decree into effect according to its spirit and intent, the variation of such an essential element as the time of payment would not fall within such a legitimate exercise of discretion, but would amount to a material alteration of the unambiguous terms of the agreement."

The petitions of the Packers were undoubtedly applications "with respect to this decree", but were they made by "the parties" within the contemplation of the reservation?

The Consent Decree was drafted by men learned in the law who were undoubtedly familiar with the principles governing consent decrees, and they must have known that such a decree may be modified only with the consent of *all* the parties. Therefore, it is a fair inference, that they intended the words "the parties" to bear their natural and ordinary meaning, namely, "all the parties" or certainly all of the parties to be affected by the modification and particularly the United States itself.

The original decree was a bargain between the Attorney-General and the defendants. Obviously a radical modification of that agreement can be made only by those who made the original and not by the Court over the objection of one of the parties, to wit, the United States.

Wherever the definite article "the" is used before a plural or collective noun, its natural significance is "all the" unless a different meaning is indicated by the context. Thus, the words "the property" in an insurance policy

have been held to mean "all the property" (*Born* v. *Home Ins. Co.*, 110 Ia. 379, 383), and a reference to "the evidence in the case" in an instruction has been held to mean "all the evidence" (*Guice* v. *State*, 60 Miss. 714, 726).

But even if it were conceded that "the parties" in the reservation meant "any of the parties" and that the court was thereby empowered to "entertain" at any time an application for modification of the decree by any party thereto, it would by no means follow that the court was thereby authorized to *grant* the requested modification without the consent of the other parties. Such consent being a legal requirement, the only way the court could properly exercise its jurisdiction would be by *dismissing the petition*, unless

1. All the parties at that time consented to the proposed modification, or

2. The language of the reservation could fairly be construed as a consent in advance by all the parties to any modification which the court, in its discretion, might see fit to make upon the application of any party.

It is plain that there was no contemporaneous consent by all the parties because, as already shown, the Government expressly refused its consent.

It would seem equally plain that the language of the reservation cannot fairly be construed as a consent by all parties in advance to any modification that the court might deem proper. In this connection it must be borne in mind that the reservation, if so construed, would cut both ways. If it authorized the court, without the consent of the Government, to emasculate the Consent Decree upon the application of the packers, so also it would enable the court, upon the application of the Government to impose upon

the defendants, without their consent, a far more onerous contract than that to which they had agreed.

It is evident that the court below considered it would have had the power, if the government had so requested, to modify the decree by imposing *additional restrictions* upon the packers over their objection. Referring to the practice by which a shipper uses that railroad which buys his products, the court said: "I consider this an element of danger with opportunities for secret rebates and preferences", although not illegal. The court added: "The government does not seek any *additional injunction* in this respect." (Italics ours.) (R. 1057.)

In the court below counsel for the packers cited the following cases as authority for their contention that the court had power to modify the consent decree without the Government's consent:

U. S. *v.* Discher, 255 Fed. 719 (D. C., S. D., N. Y.);

U. S. *v.* Dupont De Nemours & Co., 273 Fed. 869 (D. C. Del.);

U. S. *v.* N. Y., N. H. & H. R. Co. (opinion not reported);

American Press Assoc. *v.* U. S., 245 Fed. 91 (C. C. A., 7th Circ.).

In *U. S.* v. *Discher, supra,* it was pointed out on page 720 that:

> "*The decree provided* that the court retain jurisdiction to enable the parties to apply for modification of it, if it be thereafter shown *that the provisions have become inadequate to maintain competition or have become unduly oppressive to the defendants:*" (Italics ours.)

In *U. S.* v. *Dupont De Nemours & Co., supra,* at page 873, the court said:

> "The modification proposed does not call for revision of the decree on the merits, or against any person concluded thereby. The matter now before the court involves only a modification of the decree as it affects a party not sued but created and brought into the decree merely as an instrument to carry out its purpose."

In *U. S.* v. *N. Y. N. H. & H. R. Co., supra,* the decree contained an express reservation giving the right to "any party", upon reasonable notice to the other parties, to apply for "any order or modification as herein provided for." The court said:

> "Present necessities and revolutionary changes in transportation have created the emergency which *was wisely provided for in paragraph 14 of the decree.*" (Italics ours.)

In *American Press Assoc.* v. *U. S., supra,* there was no discussion whatever of the power of the court to modify without unanimous consent and no indication that the question was raised in any way. Under such circumstances the case cannot be regarded as an authority.

U. S. *v.* More, 3 Cranch 159, 172;
New *v.* Oklahoma, 195 U. S. 252, 256;
Tefft, Weller & Co. *v.* Munsuri, 222 U. S. 114, 119;
Webster *v.* Fall, 266 U. S. 507, 511.

In *U. S.* v. *More, supra,* it having been shown that the court had previously exercised jurisdiction in a similar case, Chief Justice Marshall said:

> "No question was made in that case as to the jurisdiction. It passed *sub silentio,* and the Court does not consider itself as bound by that decision."

In *Webster* v. *Fall, supra,* this Court said:

> "The most that can be said is that the point was in the cases if anyone had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."

We have been able to find no case (except the present one), and believe that none exists, in which it has been directly *held* that the court by which a consent decree has been entered possesses inherent power to modify it in any substantial respect without the consent of all the parties.

II.

Petitioners were foreclosed by their unconscionable and contumacious conduct with respect to the Consent Decree from asking a court of equity to relieve them of the obligations which they assumed when they signed that decree.

> "He that hath committed iniquity shall not have equity."
>
> Railroad Co. *v.* Soutter, 13 Wall. (U. S.) 517, 523.

> "* * * the case is presented of an effort on the part of defendant to avoid or delay the payment of a just debt. Of course, it need not be said that under such circumstances a court of equity will not strain a point to assist a defendant."

Sheffield-Furnace Co. *v.* Witherow, 149 U. S. 574, 577.

"A court of equity acts only when and as conscience commands, and if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he possesses and whatever use he may make of them in a court of law, he will be held remediless in a court of equity."

Deweese *v.* Reinhard, 165 U. S. 386, 390.

"Courts of equity frequently decline to interfere on behalf of a complainant whose attitude is unconscientious in respect of the matter concerning which it seeks relief."

National F. Ins. Co. *v.* Thompson, 281 U. S. 331, 338.

The consent decree of February 27, 1920, was both a mandate of the court ordering and decreeing that the defendants be "enjoined and restrained", and that they "divest themselves" of certain lines of business, and also, in fact and in law a contract by the defendants, whereby, for value received, they *agreed* to refrain from doing certain things and to divest themselves of certain things.

The considerations for that agreement, received and fully enjoyed by the packers, were valuable and, as they well know, cannot *now* be taken from them. Pending action of the Department of Justice, both criminal and civil, was ended (Swift Yearbook 1921, pp. 51, 13; Hearings Senate Com. on Agriculture and Forestry, 66th Cong., 2nd Session—S. 2199, S. 2202—Part 4, p. 47). Moreover, the Packers and Stockyards Act, 1921, while under consideration in Congress, was amended favorably to these defendants for the reason, which is stated in the Congressional

Record, that the consent decree of February 27, 1920, was regarded as a permanent fact (Cong. Rec., Aug. 2, 1921, pp. 4896-8; Statement of the Chairman of the Senate Committee on Agriculture and Forestry, Cong. Rec., Feb. 3, 1922).

On January 17, 1930, Senator Norris said on the floor of the Senate (Cong. Rec., Jan. 17, 1930, p. 1848):

> "* * * when we consider the origin of this decree, in which the Congress of the United States is directly interested, because it would have legislated, without any doubt, had this decree not been entered into, and the decree was entered into for the purpose of preventing legislation by Congress, with the object, I think, of having it all set aside as soon as Congress adjourned."

The court below, in refusing to modify certain parts of the decree, said:

> "* * * I think that it would be unwise to modify the Decree in these respects. There are many opportunities for secret preferences in the operation of the stockyards and of the terminals, and much for propaganda and distortion of news in newspapers. *It is probable too that Congress would have made the provisions of the Packers and Stockyards Act even more stringent had it not been for the Decree.*" (Italics ours.) (R. 1056.)

Furthermore, the Interstate Commerce Commission, in deciding the private car case in favor of these packers, regarded the consent decree as a permanent fact (62 I. C. C. Rep. 375).

After receiving and enjoying those benefits from the consent decree, the packers almost immediately began their efforts to escape from its burdens. In 1921, disguised as

the California Cooperative Canneries, which was then and is now mortgaged to and financed by Armour & Co. (R. 715, 712), they applied to the Attorney-General for a modification of the consent decree. The Attorney-General referred the matter to an Interdepartmental Committee, composed of representatives of the Departments of Justice, Agriculture and Commerce, for advice. That Committee held extensive hearings, examined a great number of witnesses and considered much documentary evidence. Its recommendations, which were adopted by the Attorney-General, were that the Attorney-General should not act upon the request of the California Cooperative Canneries and that any application for modification should be made to the court which entered the decree (Hearings pursuant to Senate Resolution 211—Senate Committee on Agriculture and Forestry, 67th Congress—2nd Session—March-April, 1922).

On April 19, 1922, California Cooperative Canneries filed its petition in the Supreme Court of the District of Columbia for leave to intervene *for the purpose of having the decree vacated.* This petition was denied on May 8, 1923. Upon appeal to the Court of Appeals of the District of Columbia, the Armour and Swift defendants for the first time *openly* attacked the consent decree when they appeared in the Court of Appeals and claimed that the decree was invalid. The Court of Appeals held that these defendants were in no position to assail the validity of the decree as they had not raised any such question in the court below, but reversed the order denying intervention to the California Cooperative Canneries and directed that such intervention be allowed and that such further proceedings be had upon its petition as might be necessary to determine the issues raised thereby (*California Cooperative Canneries* v. *United States,* 299 Fed. 908).

On November 5, 1924, the defendants Swift & Company and Armour & Company filed in the Supreme Court of the District of Columbia motions to vacate the consent decree and a similar motion was made by California Cooperative Canneries on December 26, 1924. These motions were argued together and resulted in an order, dated May 1, 1925, whereby the motions of the Swift and Armour defendants were overruled and the motion of California Cooperative Canneries was granted to the extent that the consent decree was *suspended as a whole until further order of the court made after a full hearing on the merits.* That decision has been twice reviewed by this Court (276 U. S. 311; 279 U. S. 553).

The Armour and Swift defendants appealed from the order of May 1, 1925, to the Court of Appeals, whose jurisdiction to hear the appeal was challenged by the Government. The Court of Appeals first dismissed the appeal, but following a reargument revoked the prior decision and certified certain questions to this Court. After the certified questions had been argued, this Court directed that the entire record be sent up to it, and, after argument upon the entire record, this Court, on March 19, 1928, held that the consent decree was valid (276 U. S. 311).

Following that decision the Government moved in the District of Columbia Court of Appeals for vacation of the decree of that court directing that California Cooperative Canneries be allowed to intervene. That motion having been denied, a writ of certiorari was granted by this Court, which reversed the decision below and on May 20, 1929, again unanimously upheld the consent decree, saying: (Italics ours.)

> "When our opinion in the *Swift* case settled that
> * * * the Court of Appeals was without jurisdic-

> tion * * * and that the consent decree is valid, *all obstacles to the enforcement of the consent decree should have been promptly removed''* (279 U. S. 553, 559-560).

On July 24, 1929, pursuant to the mandate of this Court, the Supreme Court of the District of Columbia entered a final decree dismissing the petition of California Cooperative Canneries for leave to intervene, denying its motion to set aside the consent decree, vacating the existing suspension of that decree and restoring it to full force and effect. It further provided that a hearing should be held on October 2, 1929, as to the time within which the Armour and Swift defendants should *complete their compliance with the consent decree,* and that this should not be construed as permitting those defendants to make contracts or commitments which would render compliance with the consent decree any more difficult on their part (R. 195-6).

That hearing was never held for the reason that on August 10, 1929; less than two months before the date set by the Court for the hearing, the Armour and Swift defendants filed their petitions in the present proceeding asking modification of the consent decree on the ground of changed economic conditions.

During the first four years after the entry of the consent decree the time within which the packers must comply with its requirements was from time to time extended by orders of the court. But on February 21, 1924, Judge Bailey refused to grant an application made by the Armour defendants for a further extension, saying in his opinion (not reported):

> ''It is true that such orders as that now asked for have been heretofore made in this cause, but I

> do not feel justified in making any further orders of this character especially in view of the fact that four years have elapsed since the entry of the original decree."

That the petitioning packers have never in good faith performed or endeavored to perform the promises they made when they signed the consent decree is established beyond question. As late as February 5, 1930, the Attorney-General, in a communication to Senator McNary concerning the status of that decree, said:

> "The provisions of the decree, especially with reference to packer ownership of stockyards stock and the handling of unrelated commodities *have never been fully complied with.*" (Italics ours.)

The record clearly shows that at all times since the entry of the decree Armour & Company has been engaged in the handling of unrelated lines notwithstanding its promise to refrain therefrom (R. 941); that Armour & Company owns a controlling interest in the National Fruit Canning Company (R. 541); that Armour & Company holds a $500,000 mortgage on the plants of California Cooperative Canneries (R. 715).

The record also shows that Swift & Company owns a majority of the voting stock of Libby, McNeill & Libby, which is engaged in canning and distributing fruit, vegetables, milk and other products (R. 643).

The foregoing facts must raise grave doubts as to the good faith of the packers' present claims that economic change is the occasion of this latest effort to defeat the consent decree. Was it economic change that caused the first attempt, in 1921, that resulted in the Interdepartmental hearings? Was it change and was it good faith

that moved Armour & Company, in 1922, to employ a spurious independent, California Cooperative Canneries, to attack the decree? It was the Government and not Armour or the Canneries that exposed the fact that the latter was heavily mortgaged to Armour. Was it change and was it good faith that in 1924 prompted Swift and Armour to make their next attempt to defeat the decree by claiming that a stipulation which they had put into it rendered it void *ab initio*?

In the Findings of Facts (Finding 3; R. 1110) the court below found

> "That there have been a few sporadic instances of unfair practices and fixing of prices by the defendants,"

and in his opinion (R. 1050-1) he discussed these instances at considerable length.

The court, in its opinion (R. 1056-7) also referred to "a tendency to unfair trade practices" on the part of petitioners as respects reciprocal buying, evidence as to which was introduced by the Government (R. 637, 799, 801-2). The Federal Trade Commission has since, on September 21, 1931, Docket No. 1779, issued its order in the matter of Waugh Equipment Company, Arthur Meeker, Frederick W. Ellis and John B. Scott, who were officers and employees of Armour & Company, which proceeding was referred to in the testimony (R. 637) requiring the respondents to desist from using the traffic of Armour & Company in the solicitation of business for the Waugh Equipment Company, the Commission finding that such practice had been indulged in by the respondents Meeker and Ellis without the knowledge of other officials of Armour & Company, except F. Edson White, President, in behalf of Waugh

Equipment Company, in which Armour officials owned stock.

The court also said in the opinion (R. 1049), with respect to the profits of Swift and Armour:

> "I think that there has been a failure to make a full disclosure of the facts in this respect."

In short, the whole history of this case is one of bad faith, failure to fulfill their promises and contumacious conduct on the part of those invoking equitable relief from the burdens of the consent decree.

It has frequently been held by this and other courts that equity will not decree specific performance of a contract at the instance of one who has himself failed to perform his own obligations under said contract.

> Marble Co. *v.* Ripley, 10 Wall. (U. S.) 339, 357;
> Ellis *v.* Treat, 236 Fed. 120 (C. C. A., 9th Circ.);
> Montana Water Co. *v.* City of Billings, 214 Fed. 121;
> Bennett *v.* Stuart, 161 Ky. 264;
> Newby *v.* Laurence, 84 Neb. 622;
> Jayne *v.* Cortland Water Works Co., 107 N. Y. App. Div. 517;
> Caldwell *v.* Virginia F. & M. Ins. Co., 124 Tenn. 593.

Is there any reason why a court of equity should look with greater favor upon parties to a contract who, after receiving and enjoying all the considerations moving to them, have over a period of twelve years failed to perform, and persistently sought to nullify, the promises made by them, and now ask to be relieved entirely from the obligation of those promises?

"One who has received the full benefit of a contract, where it is of such a nature that it cannot be restored, cannot have the aid of equity to avoid the contract obligations."

21 Corpus Juris 179.

"• • • whenever a party, who, *as actor*, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him *in limine;* the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy."

1 Pomeroy, Eq. Jur., §397.

In *Union Cent. L. Ins. Co.* v. *Drake,* 214 Fed. 536, 542 (C. C. A., 8th Circ.), Judge Sanborn said:

"'He who has done iniquity cannot have equity', and 'He who comes into a court of equity must come with clean hands', are familiar maxims in equity. And the rule that one who has been guilty of bad faith, fraud or any unconscionable act in the transaction which forms the basis of his claim is entitled to no relief in equity on account of that transaction, forbids such a decree."

III.

The considerations presented by the bulk of the packers' evidence are for Congress and not for the courts, namely: (1) that Armour and Swift are actuated by good intentions; (2) that modification will benefit the public and relieve petitioners of alleged hardship and inconvenience; (3) that the existing Anti-Trust Laws are unwise.

The professed claim of Armour and Swift is that, during the twelve years since the entry of the consent decree, conditions have so changed that, if released now from the restraints of that decree, they will not constitute such a menace to free competition as they were at the time the consent decree was entered. But as shown in Point IV, *post*, the evidence falls far short of proving any changed conditions justifying modification. The petitioners' evidence addressed itself principally to the following propositions:

1. That Armour and Swift are actuated by good intentions;

2. That modification will benefit the public and relieve petitioners of alleged hardship and inconvenience;

3. That the existing anti-trust laws are unwise.

An examination of the material cited in the footnote (see Appendix, *post*, page 51) to *Swift & Co.* v. *U. S.*, 276 U. S. 311, 319, shows that such contentions by Swift and Armour are by no means new. This Court has repeatedly considered similar claims by these packers, as well as by others, under the anti-trust laws.

It is thoroughly well established by a long line of anti-trust decisions that those are considerations to be addressed, not to the courts, but to Congress, and that the

only proper concern of the courts in cases of this kind is whether the facts show a situation or potential result (*Swift & Co. v. U. S.*, 276 U. S. 311, 326) within the condemnation of the Anti-Trust Laws that Congress has seen fit to enact:

> Paramount Famous Lasky Corp. *v.* U. S., 282 U. S. 30, 44;
>
> Thomsen *v.* Cayser, 243 U. S. 66, 85;
>
> International Harvester Co. *v.* Missouri, 234 U. S. 199, 209;
>
> Standard Sanitary Mfg. Co. *v.* U. S., 226 U. S. 20, 49 (affirming 191 Fed. 172);
>
> Armour Packing Co. *v.* U. S., 209 U. S. 56, 82;
>
> Standard Oil Co. *v.* U. S., 221 U. S. 1, 65;
>
> New Haven R. R. *v.* Interstate Commerce Comm., 200 U. S. 361, 399;
>
> U. S. *v.* Northern Sec. Co., 120 Fed. 721, 730 (affirmed 193 U. S. 197);
>
> Lee Line Steamers, Inc. *v.* Memphis, etc., Packet Co., 277 Fed. 5, 8 (C. C. A., 6th Circ.);
>
> Ford Motor Co. *v.* Union Motor Sales Co., 244 Fed. 156, 162 (C. C. A., 6th Circ.);
>
> U. S. *v.* Great Lakes Towing Co., 208 Fed. 733, 744 (D. C., Ohio);
>
> Standard Fashion Co. *v.* Magrane Houston Co., 254 Fed. 493, 499 (D. C., Mass.).

In the *International Harvester* case, *supra*, the Court said (234 U. S., at p. 209):

> "It is too late in the day to assert against statutes which forbid combinations of competing companies that a particular combination was induced by good intentions and has had some good effect. *Armour*

Packing Co. v. *United States*, 209 U. S. 56, 82; *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 49."

In *Standard Sanitary Mfg. Co.* v. *U. S.*, 226 U. S. 20, 49, affirming 191 Fed. 172, the Court said:

> "The Sherman law is a limitation of rights, rights which may be pushed to evil consequences and therefore restrained. * * * The law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intentions of parties, and, it may be, of some good results. *United States* v. *Trans-Missouri Freight Asso.*, 166 U. S. 290; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 62."

In the opinion below (191 Fed. 172) the Court, speaking of the defendants' contentions, said (p. 178):

> "They say that eyes illumined by the light of reason will see that what the defendants did was from the standpoint of the public interests good, and not evil."

With regard to this the Court said at page 182:

> "They may not break the law because they think that it will be well to do so. In view of the character of the parties, the necessary effect of the agreements was clearly to restrain trade within the purview of the statute. In such case they cannot be taken out of the category of the unlawful by general reasoning as to their expediency or non-expediency or the wisdom or want of wisdom of the statute which prohibited their being made. When the nature and character of the contracts create a conclusive presumption bringing them within the statute, such a result is not to be disregarded by the courts by a substitution of a judi-

cial appreciation of what the law ought to be for the plain judicial duty of enforcing the law as it is. *Standard Oil Co.* v. *United States*, 221 U. S. 65."

In *Armour Packing Co.* v. *United States*, 209 U. S. 56, 82, the Court said:

> "The right to make such regulations is inherent in the power of Congress to legislate respecting interstate commerce, and such considerations of inconvenience and hardship address themselves to the law-making branch of the Government. *New Haven Railroad Company* v. *Interstate Commerce Commission*, 200 U. S. 399. It may be that such contracts should be recognized, giving stability to rates for limited periods; that the contracts being filed and published, and the rate stipulated known and open to all, no injustice would be done. But, as we have said, such considerations address themselves to Congress, not to the courts. It is the province of the judiciary to enforce laws constitutionally enacted, not to make them to suit their own views of propriety or justice."

In *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 65, the Court pointed out that "the rule of reason" did not go so far as to justify a court in substituting its own view for that of Congress as to what the law ought to be. The Court said that acts clearly in restraint of trade within the purview of the statute

> "Could not be taken out of that category by indulging in general reasoning as to the expediency or non-expediency of having made the contracts or the wisdom or want of wisdom of the statute which prohibited their being made."

In *New Haven R. R.* v. *Interstate Commerce Commission*, 200 U. S. 361, 399, the Court said:

> "Even, therefore, if the result of applying the prohibitions as we have interpreted them will be practically to render it difficult, if not impossible, for a carrier to deal in commodities, this affords no ground for relieving us of the plain duty of enforcing the provisions of the statute as they exist."

In *U. S.* v. *Northern Securities Co.*, 120 Fed. Rep. 721 (affirmed 193 U. S. 197), the Circuit Court said, at pages 730-1:

> "It may be that such a virtual consolidation of parallel and competing lines of railroad as have been effected, taking a broad view of the situation, is beneficial to the public rather than harmful. It may be that the motives which inspired the combination by which this end was accomplished were wholly laudable and unselfish; that the combination was formed by the individual defendants to protect great interests which had been committed to their charge; or it may be that the combination was the initial and a necessary step in great designs, which, if carried out as they conceived would be of inestimable value to the communities which these roads serve and to the country at large."

The court held that those propositions involved "questions of public policy which Congress must determine" and that the court's duty was merely to decide whether or not the facts showed a violation of the Sherman Act as interpreted by the Supreme Court.

The most recent statement of the position of the Supreme Court with reference to the Sherman Act is found in *Paramount Famous Lasky Corporation, et al.*, vs. *United States*, 282 U. S. 30, in which the court said, at page 43:

> "The Sherman Act seeks to protect the public against evils commonly incident to the unreasonable

destruction of competition and no length of discussion or experimentation amongst parties to a combination which produces the inhibited result can give validity to their action. Congress has so legislated 'as to prevent resort to practices which unduly restrain competition or unduly obstruct the free flow of such commerce, and private choice of means must yield to the national authority thus exerted.' *Eastern States Lumber Assn.* v. *United States, supra,* 613."

IV.

The petitioners failed to sustain their burden of showing that conditions had so changed since the entry of the consent decree as to justify the modification made by the court below and that, if given the right to engage in the manufacture and wholesaling of groceries, they would not constitute a renewed threat of the "long feared monopoly in meat and other food products", to prevent which the Consent Decree was entered under the anti-trust laws.

In *Swift & Co.* v. *United States,* 276 U. S. 311, 318, this Court pointed out that the consent decree was entered "with a view to *preventing* a long feared monopoly in meat and other food products", and in a footnote (p. 319) cited the authorities in which might be found the history of the preceding thirty years of struggle on the part of the Government to prevent the packers from accomplishing their purpose (see Appendix, *post,* p. 51).

In the same decision, at page 326, this Court, answering the argument that there was no case or controversy because the Government had by accepting the stipulation tacitly abandoned all charges that defendants *had violated* the law, said (italics ours):

> "The argument ignores the fact that a suit for an injunction deals primarily, not with past violations, but with *threatened future ones;* and that an injunction may issue *to prevent future wrong,* although no right has yet been violated."

At page 320 the Court pointed out that the decree to which the defendants *consented* contains the recital "that the allegations of the petitioner *state a cause of action against the defendants* under the provisions" of the Sherman Anti-Trust Act and supplementary legislation, and at page 327 the Court said:

> "The allegations of the bill not specifically denied may have afforded ample basis for a decree limited to future acts. *Deputron* v. *Young,* 134 U. S. 241, 250-251. If the court erred in finding in these allegations a basis for fear of future wrong sufficient to warrant an injunction, its error was of a character ordinarily remediable on appeal".

It is fairly inferable from that decision that, if in 1920 the packers, instead of consenting to the decree, had resisted, and the Government had produced adequate evidence to support the allegations of the bill with respect to *threatened* monopoly, a *judicial* decree by the court in the same terms as the consent decree would have been upheld by this Court, even though there had been no proof of *past* violations of the Anti-Trust Laws.

When Swift and Armour petitioned for modification of the consent decree they assumed the burden of proving affirmatively that conditions had so changed since the entry of that decree as to render it inequitable and that, if released now from the restraints of that decree, there would be no such "basis for fear of future wrong sufficient to

warrant an injunction" as existed in 1920—that those restraints are no longer necessary to *prevent* the future achievement by the packers of the "long feared monopoly in meat and other food products."

We submit that the Swift and Armour defendants have failed to sustain that burden; that they have not shown any changed conditions which justify the modification made by the court below, and that under such modification the defendants would soon be as great a menace as they were in 1920.

In the first place, it is self-evident that the difference between the conditions existing now and those existing when the consent decree was entered is due in large part to the decree itself. That decree, buttressed by the Packers and Stockyards Act, formed a dam behind which the packers were confined to their legitimate activities. It was the one really effective achievement of the Government in its many years of struggle with the packers. While Swift and Armour have never fully complied with its requirements, they have nevertheless felt its restraining influence quite keenly, as is shown by their twelve years of frantic and unceasing effort to destroy it; and in those twelve years, under the protection of the decree, the food industry has attained the state of healthy competition disclosed by the evidence. And now the court below has opened a great breach in the centre of the dam, apparently believing that the remaining portions of the structure will retain sufficient of the water for all practical purposes.

In the second place, any economic changes disclosed by the evidence lay for the most part in fields to which the court below, in its decree of January 31, 1931, refused the packers readmittance. In general, the petitioners sought to have the decree so modified as to permit them:

(1) To retain or acquire the ownership of stockyards, stockyard market companies and stockyard terminal railroads;

(2) To engage in the manufacture and sale of lines of food unrelated to the meat industry, known as the "unrelated lines";

(3) To own and operate retail stores.

It is evident from the Court's opinion that it found far more changes in conditions respecting the stockyards and the retailing of food products than in the case of the manufacture and wholesaling of the unrelated lines, yet modified the decree as to the field in which there was the least justification while refusing it in those where it found the most.

With respect to the stockyards, the court found three changes in conditions which it believed limited the power of the defendants to acquire a monopoly. These were:

1. The enactment of the Packers and Stockyards Act in 1921 (R. 1052-3);

2. The regulation of terminal railroads by the Interstate Commerce Commission (R. 1053);

3. General dissemination of statistics regarding livestock with respect to which the defendants formerly had more or less exclusive information (R. 1053-4).

With respect to retailing, it appeared that since the decree had been entered chain retail stores had increased from 15,000 to 60,000 in 1929, and that whereas in 1920 only 1,200 of these stores had fresh meat departments, in 1929 15,800 sold fresh meats. Notwithstanding these changes which the court recognized, it refused to modify the decree with respect to the stockyards or the ownership or operation of retail stores because it felt that to do so would

restore the menace of the packers and that it would result in the destruction of their competitors in these fields. As no appeal was taken by the packers from the refusal of the court to modify the decree as to the stockyards and retailing, reference is made thereto only to show by comparison that whatever evidence there may have been of change relates rather to stockyards and retailing than to manufacture and wholesaling.

It does appear that there has been since 1917 some growth, chiefly through combinations and mergers, of what are called horizontally integrated companies engaged in the manufacture of food products. These combinations and mergers were to a large extent due to the promotional activities of bankers during the recent halcyon days to have a source of securities which they could sell to an eager public rather than to any changes surrounding the production of food products. This is not only a matter of common knowledge but is established by the record (R. 700-1).

None of these companies, however, begins to approach either the Armour or Swift defendants in size; sales of the two *largest* in 1929 each was approximately 30% of the sales of *either* Armour *or* Swift; the sales of the next largest were less than 13%, and the sales of no other amounted to 10% (R. 838-a). Moreover, none of these companies competed with the petitioners as slaughterers.

Practically no change has taken place since 1919 in the wholesale food business. The record shows that there are approximately six thousand wholesale grocers in the United States, employing between 125,000 and 150,000 persons, and with a total investment in the business of between $1,250,000,000 and $1,500,000,000 (R. 773); that competition among them is keen and active (R. 761, 780, 785, 786, 788, 775); and that profits are very small (R. 761, 775, 780) and

changes in the prices of producers and manufacturers are promptly reflected (R. 769, 770, 780).

The reason given by the packers for their desire to invade the field of wholesaling the unrelated lines is that they already have facilities which they could use in this business without greatly increased expenses. In other words, profits would be increased. These facilities consist of their present selling organizations, their branch stores, warehouses, private railroad cars and trucks. For example, it is in evidence that Armour owns 391 branch houses, and Swift 431; that Armour owns 6,766 refrigerator cars and Swift 5,509; that Armour operates 317 car routes and Swift 1,014 (Petitioners' Exhibits 119, 121, 122 and 143). Justice Bailey in his opinion gives a partial explanation of the manner in which these facilities could be employed with comparatively little increase of overhead in the distribution of groceries as follows (R. 1054):

> "A certain minimum weight is required by the railroad companies in each of these cars, so that where, for instance, the minimum weight required is 10,000 pounds and only 8,000 pounds are put into the car by the shipper he will nevertheless have to pay freight charges on 10,000 pounds. The result, therefore, is that where the packer has only 8,000 pounds of meat to be shipped in one of these cars and he adds enough of other commodities to bring up the weight of the whole to the minimum, while he has to pay for the total amount shipped, he is enabled to ship the additional commodities without additional cost. This it is claimed, gives the packer whose business is large enough for him to make use of these cars, a great advantage over his competitors in other lines of business. He either pays less freight for the shipment of his meat than he would other-

wise do, or *he is enabled to ship his other commodities almost without expense.*" (Italics ours.)

But it is all important to note that there is no change in this respect from the conditions which existed at the time the proceeding was commenced and that the modification of the Decree permits the packers to do just what the original bill sought to prevent. The bill of complaint in this respect alleged as follows (R. 17; italics ours):

> "Having eliminated competition in the meat products, the defendants next took cognizance of the competition which might be expected from what we here refer to as substitute foods. Their experience had taught them that if meat prices advanced out of proportion to that of other substitute foods, the consuming public manifested a tendency to turn to such substitutes. To prevent this the defendants set about controlling the Nation's supplies of fish, vegetables, either fresh or canned, fruits, cereals, milk, poultry, butter, eggs, cheese, and other substitute foods ordinarily handled by wholesale grocers or produce dealers. *To accomplish this purpose the defendants availed themselves of the advantages afforded by the refrigerator cars, route cars, auto trucks, branch houses, and storage warehouses owned or controlled by them. These facilities intended primarily for the sale of meats were employed with comparatively no increase of overhead in the distribution of the substitute foods and unrelated commodities.* The defendants were enabled thereby to reach remote spots. This advantage was also employed temporarily to fix prices so low as to gradually eliminate competition.
>
> "These attempts to monopolize have resulted in complete control in many of the substitute food lines.

> They have made substantial headway in others. The control is extensively and rapidly increasing. New fields are gradually being invaded, and unless prevented by a decree of this court the defendants will within the compass of a few years control the quantity and price of each article of food found on the American table." (Italics ours.)

The Government refers above to advantages enjoyed by the defendant meat packers through the use of their facilities for the distribution of "unrelated commodities" in 1920. Ten years later, the court below stated, in its opinion, that the big packer "either pays less freight for the shipment of his meat than he would otherwise do, or he is enabled to ship his other commodities (unrelated lines) almost without expense" (R. 1054-5). In this respect, the court below finds "no change" and yet it grants permission to manufacture and to handle the unrelated lines.

Not only would the danger of monopoly be quite as great as in 1920 if this modification of the decree is permitted, but in important respects the danger would be far greater. Over independent wholesalers the packers would have the following marked advantages:

> (1) The power of their large resources which rival those of all the independent wholesale grocers in the country;
>
> (2) The advantage of fast freight service and deliveries on schedule, through the use of their own refrigerator cars in which in addition to their meat products they would be permitted to place grocery items;
>
> (3) Freight savings, such as might arise out of the savings of penalties now imposed where meat shipments are less than minimum carload quantities;

(4) The ability to take advantage of the natural inclination of retailers handling meats to give the same supplier a grocery order for many obvious reasons, such as saving of time in making purchases, better service as a large customer and securing better choice of meats, with which there must be included the potential ability to force the retailer to purchase grocery orders from the same party as the seller of his meats in order to secure such service. In this respect the defendants would possess a greater advantage than existed in 1920, due to the large increase in the number of retail stores handling meats as well as groceries.

As to the present size and power of the packers, it would seem sufficient to quote the following excerpts from the opinion below:

> "Swift & Company and Armour & Company each had sales amounting to more than one billion dollars in 1920 and also in 1929. The business done by the other two defendants was much smaller. So far as volume of business is concerned, however, only the A. & P. approached the volume done by Armour & Company or by Swift & Company and the nature of the business of A. & P. can hardly be said to compete with that of the packers" (R. 1047).
>
> * * * * * *
>
> "The petitioners, Swift & Company and Armour & Company, together control over 54% of the output of all packers engaged in interstate commerce, and all the defendants combined control over 70% of that business so that, if the four defendant groups should act together under any agreement or combination, **they would unquestionably be able to control the greater part of this interstate business and this would be the case even if Swift & Company and Armour & Company alone should combine" (R. 1050).**

The volume of each of these packers alone exceeds that of every one of the so-called "great integrated" companies such as National Dairy Products, the Borden Company, General Foods Corporation and Standard Brands, and exceeded in 1929 by almost 700 million dollars the largest of these other food manufacturers (R. 838a.).

Armour & Company owns a controlling interest in the National Fruit Canning Company which has an annual business of approximately $3,500,000 (R. 541). It also holds a $500,000 mortgage on the plants of California Co-operative Canneries, whose total liabilities to it exceed $1,000,000 (R. 715).

Swift & Company owns 60% of the voting stock of Libby, McNeil & Libby, which is engaged in the canning of fruits, vegetables and other products (R. 643).

With respect to the profits made by Swift and Armour during the period since the entry of the consent decree, the court below said (R. 1049):

> "There are some rather singular facts as to the profits of Swift and of Armour, which are not explained. * * * I think that there has been a failure to make a full disclosure of the facts in this respect."

However, as we are now considering future possibilities in case the modifications granted below are allowed to stand, the question of profits prior to those modifications is of much less importance than the present great size, power and potentialities of these packers and the increases in volume and profits that they themselves here assert will come to them if permitted to manufacture and wholesale all foods in addition to their present volume (which volume includes not only meat products but dairy products and the hundreds of other items still allowed them under the original decree).

The meat packing business itself is the largest in the United States, having now passed the automobile business in point of volume (R. 419). The two largest factors in the largest industry in the United States are here asking permission to become still larger. Moreover, in the ten years during which it seeks to show "changes" detrimental to itself, Swift & Company, the largest packer, has increased the number both of its car routes and of its branch houses (R. 956). This hardly bears out its claim that the restrictions of the decree have burdened it with surplus facilities—the cars and branch houses it now desires to use for unrelated lines.

That the packers still retain the disposition to use unfairly against competitors such advantages as they are allowed to have is also sufficiently indicated in the opinion (R. 1050-51) and findings (Finding No. 3, R. 1110) of the court below.

In view of the foregoing facts, can there be any real doubt that the readmission of the packers to the wholesale grocery field and the permission to them to engage also in the *manufacture* of such products will speedily result in the elimination of the independent wholesale grocers and in the curtailment of the business of the independent food manufacturers? And with the independents curtailed or eliminated, what will become of the independence of the independent retailers? Naturally they cannot look for their supplies to their competitors, the chain stores; their only source will be the packers. And when the growing preference of the public for retail stores handling both groceries and meats is taken into consideration, the glittering possibilities opened to the packers come more clearly into view.

The court below expressed concern (R. 1058-9) regarding the independent retailers and refused to permit the

packers to retail, but, when the court admitted the packers to both manufacturing and wholesaling in the entire food field, it left the independent retailer merely the temporary shadow of protection. Nor would the surviving chain retailers be entirely free of packer domination. In the opinion below, the court said:

> "The chains do a very small part of the slaughtering business, and are themselves largely dependent upon the petitioners for their supplies" (R. 1049).

Only one thing more is needed, namely, the reduction of competition in meat products to the point it had reached in 1920. The evidence shows that, under the protection of the consent decree, such competition has grown, but does it show that this competition cannot again be suppressed—does it show this with sufficient certainty to justify releasing the packers from a restraint which, once relinquished, cannot easily be reimposed?

Testimony of independent meat packers was introduced to support petitioners' claim that the independents have grown, at the expense of the big four packers, during the past ten years, but the Government's Exhibits 9 and 22 are an effectual answer. They establish that, in 1928, the federally inspected slaughterers, other than the defendant packers, showed, as a group, $515,716 less than no net profits, while, for the same year, the defendant packers had net profits of $16,299,602. Obviously, if permission to handle unrelated lines, granted by the court below, enables Swift and Armour to profit out of groceries, and so to reduce prices of meats, as they claim, then the future of the independent meat packer is precarious. The court below points out some of the advantages that Swift and Armour already have over the smaller meat packers and then quotes

President White of Armour & Company with respect to its progress in the development of the quick freezing process, as follows:

> " 'The development so far made would give us ample satisfaction to the point where we could meet the competition of any food that is now prepared in any method or by any method that is now on the market, when and if we want to do it' " (R. 1056).

Elsewhere in the record are found most express admissions, both by the President of Swift & Company and the President of Armour & Company that their position is impregnable even if the consent decree remains unchanged (Government's Exhibit 101, pp. 6-7, and R. 638).

The court below says "Swift & Company has paid dividends regularly for forty-four years and from 1920 to 1929 at the rate of eight per cent and during the same time has added to its surplus and reserve over $16,000,000" (R. 1049).

The United States has repeatedly shown in this case, by its witnesses and by cross-examination of petitioners' witnesses, that if the packers have the surplus equipment and personnel claimed, then modification of the decree, as prayed, would transfer all or part of the burden of this surplus, this extra warehousing space and equipment and personnel from the shoulders of the defendants, who agreed, for a consideration, to leave the field, to the shoulders of the independent merchants of the country, engaged in the various branches of food wholesaling, because it is repeatedly shown by both packer and Government witnesses that there is no shortage of facilities today in any part of the country (R. 773, 1046, 688, 775).

In the matter of national distribution of their products the Big Four Packers are far ahead of any competitors (R.

527), only a few of whom can fairly be regarded as in any sense national distributors, and of these only two show annual sales in excess of $50,000,000 (R. 866-a). The bulk of the competition is of a local character, by packers whose operations are limited within a radius of 200 miles (R. 434, 440, 437, 426, 421). As was pointed out by the court below, the advantage which these local packers now possess of being able to supply their customers with freshly killed meat, can readily be overcome by the perfection and application of the quick-freezing process. In the opinion below the court said (R. 1055):

> "A great change in methods of distribution of meat and meat products is being brought about too by what is known as the quick-freezing process. Meat is subjected to temperatures of from 30 degrees to 40 degrees below zero (Fahrenheit), and when thus frozen, the texture and flavor of the commodity is unimpaired, and it can be preserved in this condition for months. By this method meat can be cut up by the packer and prepared in packages for the retail markets and sold in the original packages. *One great advantage that the local packer now has will end, for there will be no advantage in appearance or flavor in freshly slaughtered meats.* Then too the packer can more easily keep his products, and not be forced to dump them upon the market at unfavorable times. He can also, by the use of his brands, make use of the increasing public demand for articles which are so branded that the consumer can know that he has tested and found satisfactory before." (Italics ours.)

In claiming "changes" since 1920, the packers vigorously urge that modification of the consent decree is justified, for the reason that large corporations, such as the

Great Atlantic & Pacific Tea Company (mentioned by the court as A. & P.) and Kroger Grocery & Baking Company have gone into the meat packing business. But an exhibit introduced by petitioners shows that A. & P. has no "meat packing operations", other than "meat warehousing" and "bacon slicing" (R. 921). Moreover, Kroger has only two meat packing plants. One was acquired in 1920 and the other has been operated for twenty years (R. 501). Kroger closed three hundred stores in 1930 (R. 502). There is little "menace" here.

The court below said (R. 1049):

> "I think that the petitioners exaggerate these dangers. The chains do a very small part of the slaughtering business and are themselves largely dependent upon the petitioners for their supplies. There is constant and keen competition, and *I do not see that the size of the chains give them any unfair advantages over the packers.*" (Italics ours.)

That is conclusively established. But there is no proof nor even any claim by the packers that *the wholesale grocers* do slaughtering or make large profits or are in any way a menace to the packers. Why, then, does the court below readmit these meat packers to the wholesale grocery business and yet continue to exclude them from the chain store field, in which are found many prosperous chains, including the only food company that can even compare in sales volume with either Armour or Swift, that is A. & P.? The modification seems to protect no one except the big packers and the chains, since it leaves the packers free to resume their operations in the grocery manufacturing and wholesaling field to the prejudice of independent manufacturers and wholesalers, who now constitute the chief source of supply for the small independent retail grocers. The

court, in its opinion (R. 1058), said, as respects retailing: "The control by the defendants of the great amount of interstate commerce in meats and other articles from the producer to the consumer would probably result in the almost complete annihilation of the independent retail grocer, already a minority in volume of business." And yet, the modification decreed by the court will eventually leave these independent retailers (who have already lost a large volume of their business to the chain stores) dependent upon the petitioners for supplies not only of meat, but also of all other foods.

The packers claim that they can accomplish economies by re-entering the wholesale grocery field, but there is no proof introduced or offered that the packers made savings for the public during any part of those forty years, *prior* to 1920, in which they were engaged in business and were free to handle and did handle, at wholesale or otherwise, the unrelated lines.

In attempting to show "change", petitioners claim that this court, March 1, 1920, two days after the consent decree was entered, changed the interpretation of the Sherman Act, in deciding *United States* v. *United States Steel Corporation*, 251 U. S. 417. The answer is found in the Court's opinion in that case, which cites, with approval, two earlier outstanding opinions under the Sherman Act; that in the Standard Oil case and that in the Tobacco case.

Another claim of change is the enactment of the Packers and Stockyards Act, 1921, but, as we have shown, Congress, in enacting that statute, considered the consent decree as permanent. Moreover, the statute has no bearing upon the modification made by the court below, because this Act of 1921 is limited in scope to the meat industry and has no reference to unrelated lines.

Let us suppose that instead of applying for modification of the consent decree the packers had applied to the Attorney-General for approval to acquire one or more of the large integrated food companies, whose operations, they now claim, entitle the packers to modification of the decree. Would this be any different from the situation that confronted the Government and the Attorney-General at the time of recent proposals to organize large corporations to engage in the sale of food products, representing a merger of existing food corporations? These proposals resulted in action by the Government before consummation of the proposed mergers, and decrees against the defendants followed (*United States* v. *Ward Food Products Corporation,* U. S. District Court for Maryland, February, 1926; *United States* v. *National Food Products Corporation,* U. S. District Court, Southern District of New York, March 4, 1926).

Is not the same question before this court in the guise of modification of this decree, that is, modification to permit the packers to create just such a combination in the meat and food industries?

The consent decree, as conceived by the packers and entered into by the Government in 1920, was, in fact, and still should be considered an entirety, a plan for composing the controversy that had persisted between these packers and the Government through the Department of Justice (and later the Federal Trade Commission) for more than thirty years (Appendix, *post,* p. 51). Each part of the decree is a constituent and inseparable part thereof and its modification in particulars so vital as those ordered by the court below has the effect of nullifying the agreement upon which it is based and will seriously endanger, if not entirely destroy, the decree.

In *Swift & Co.* v. *United States*, 196 U. S. 375, this court said, at page 396:

> "The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately, when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful, and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful. Aikens *v.* Wisconsin, 195 U. S. 194, 206. * * * The unity of the plan embraces all the parts."

Certainly the evidence in this case furnishes no assurance that the packers, if granted freedom to engage in the manufacture and wholesaling of groceries, will not be able to reestablish at least as near an approach to monopoly of the food supply as they had when the consent decree was entered.

Failing to furnish such assurance, they have failed to sustain the burden of proof assumed by them when they petitioned for modification of that decree. The failure of the court below to make or to rule upon the proposed findings submitted to it by this intervener (R. 1082-1093), was duly excepted to (R. 1117) and assigned as error (R. 1125).

V.

The decree appealed from should be reversed in so far as it modified the consent decree, and the petitions should be ordered to be dismissed, with costs to appellants.

Dated, February 8, 1932.

Respectfully submitted,

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APPENDIX.

Events Preceding the Consent Decree.

(See also footnote in *Swift & Co.* v. *U, S.*, 276 U. S. 311, 319)

1. "The first public record of an inquiry into the relations of these corporations is the report made in 1890 by a committee of the United States Senate. After two years of investigation, this committee unanimously reported that there was an agreement between the then leading packers, namely, Armour & Co., Swift & Co., Nelson, Morris & Co., Hammond & Co., to refrain from competition. The committee found, among other things, that there was collusion with regard to the fixing of prices and the division of territory and business. *The conditions revealed by this investigation, it may be remarked, were in part responsible for the passage of the Sherman Anti-Trust Act on July 2, 1890.*" (Summary of the Report of the Federal Trade Commission on the Meat-Packing Industry, July 3, 1918, page 22.)

2. The activities of the packer defendants during the two decades following enactment of the Sherman Law are described by this Court in *Stafford* v. *Wallace*, 258 U. S. 495, decided in 1922. At page 499 this Court said:

> "It appeared from the data before the Committee that for more than two decades it had been charged that the five great packing establishments of Swift, Armour, Cudahy, Wilson and Morris, called the 'Big Five', were engaged in a conspiracy in violation of the Anti-Trust Law, to control the business of the purchase of the live stock, their preparation for use in meat products, and the distribution and sale thereof in this country and abroad. In 1903, a bill in equity was filed by the United States to enjoin further conduct of this alleged conspiracy, as a viola-

tion of the Anti-Trust Law, and an injunction issued. *United States* v. *Swift & Co.*, 122 Fed. 529. The case was taken on appeal to this Court, which sustained the injunction. *Swift & Co.* v. *United States,* 196 U. S. 375. In 1912, these same defendants or their successors in business were indicted and tried for such violation of the Anti-Trust Law, and acquitted. (See House Committee Hearings before Committee on Agriculture, 1920, Vols. 220-2, Subject, Meat Packers Legislation, p. 718.) It further appeared that on February 7, 1917, the President directed the Federal Trade Commission to investigate and report the facts relating to this industry and kindred subjects. The Commission reported that the 'Big Five' packing firms had complete control of the trade from the producer to the consumer, had eliminated competition and that one of the essential means by which this was made possible was their ownership of a controlling part of the stock in the stockyards companies of the country."

3. In 1903 (in a contested proceeding) an injunction was issued by the United States Circuit Court, Northern District of Illinois, against Swift & Company, Armour & Company, Cudahy Packing Company, Nelson Morris & Company, Schwarzschild & Sulzberger (predecessors of Wilson & Company), together with other corporation and individual defendants, restraining them from violations of the Sherman Anti-Trust Act. Appeal from the injunction was prosecuted to this Court, and with certain slight alterations the Decree appealed from was affirmed. This injunction still is in force and effect. (*Swift & Company* v. *United States,* 196 U. S. 375.)

4. In 1905 an indictment was returned by the United States grand jury in Illinois against Armour & Company,

Swift & Company, Cudahy Packing Company and the individuals composing Morris & Company, together with a number of individuals connected with the corporations, charging them with conspiracy in restraint of trade and commerce and in an attempt to monopolize such trade and commerce in violation of the Sherman Anti-Trust Act. After the overruling of a plea in abatement and a demurrer interposed by the defendants to the indictment, the defendants filed special pleas, claiming immunity by reason of their having given testimony against themselves before the Commissioner of Corporations. This plea was sustained and the indictment dismissed as to the individual defendants (*United States* v. *Armour*, 142 Fed. 808). An order of *nolle prosequi* was subsequently entered against the corporation defendants.

5. Following the entry of the Decree in *Swift & Company* v. *United States* (*supra*), in 1903 there came the organization of National Packing Company, the entire stock of which was held by Armour & Company, Swift & Company and Morris & Company:

> "The big packers thereupon decided to merge the properties which they had secretly acquired, and thus it was that the National Packing Co. came to be formed. Cudahy and Sulzberger were invited to purchase stock in the company, but declined to assume these additional obligations, probably for financial reasons. The entire stock of the National Packing Co. was therefore held by Armour, Swift and Morris in proportion to the capital assets of the respective companies; that is to say, Armour & Co., 40.11; Swift & Co., 46.70; Morris & Co., 13.19; and properties acquired by the National Packing Co. after its formation in 1903 were jointly paid for by the

Armour, Swift and Morris companies in the same proportion.

"The board of directors of the National Packing Co. was made up entirely of representatives of the three big companies. When these directors met each Tuesday afternoon at 2 o'clock (the same day and hour as the old Veeder pool meetings) to decide on policies, prices, and buying and shipping plans they were, in fact, acting for all their joint interests, and no further communication was necessary. This simple and highly effective plan for interchanging information and fixing joint policies persisted undisturbed until, after the failure of the criminal suit against several of the big packers in 1911-12, the threat of a civil suit brought about the dissolution of the National Packing Co. during July and August, 1912. The dissolution consisted in a distribution of the properties of the National Packing Co. among Armour & Co., Swift & Co. and Morris & Co., and left all the strong independents which had been absorbed into the National Packing Co. still in the hands of the packers." (Summary of the Report of the Federal Trade Commission on the Meat Packing Industry, July 3, 1918, pp. 23-24.)

6. On February 7, 1917, the President of the United States directed a letter to the Federal Trade Commission requesting an investigation of the facts relating to the production, ownership, manufacture, storage and distribution of food products, in which he said:

"Pursuant to the authority conferred upon me by the Act creating the Federal Trade Commission, therefore, I direct the Commission, within the scope of its powers, to investigate and report the facts relating to the production, ownership, manufacture, storage, and distribution of foodstuffs and the products or by-products arising from or in connection

with their preparation and manufacture; to ascertain the facts bearing on alleged violations of the anti-trust acts, and particularly upon the question whether there are manipulations, controls, trusts, combination, conspiracies, or restraints of trade out of harmony with the law or the public interest" (Report of Federal Trade Commission on Meat-Packing Industry, Part I, p. 392).

On July 3, 1918 the Federal Trade Commission made its report to the President of the United States. In a letter transmitting the report the Commission said (Summary of Report on Meat Packing Industry, July 3, 1918, p. 3):

> "Answering directly your question as to whether or not there exist 'monopolies, controls, trusts, combinations, conspiracies, or restraints of trade out of harmony with the law and the public interest,' *we have found conclusive evidence that warrants an unqualified affirmative.* * * *"
>
> "It appears that five great packing concerns of the country—Swift, Armour, Morris, Cudahy and Wilson—have attained such a dominant position that they control at will the market in which they buy their supplies, the market in which they sell their products, and hold the fortunes of their competitors in their hands".

The situation disclosed by this report of the Federal Trade Commission is summarized by it in the following paragraphs: (Italics ours)

> "Five corporations—Armour & Co., Swift & Co., Morris & Co., Wilson & Co., Inc., and the Cudahy Packing Co.—hereafter referred to as the 'Big Five' or 'The Packers', together with their subsidiaries and affiliated companies, not only have a monopo-

listic control over the American meat industry, but *have secured control, similar in purpose if not yet in extent, over the principal substitutes for meat, such as eggs, cheese, and vegetable-oil products, and are rapidly extending their power to cover fish and nearly every kind of foodstuff*" (Summary of Report on Meat Packing Industry, July 3, 1918, p. 9).

"The business of the packing companies originally was limited to the slaughter of live stock and the distribution of meat and animal products and by-products. Now, however, they are rapidly extending their control over all possible substitutes for meat—fish, poultry, eggs, milk, butter, cheese, and all kinds of vegetable oil products, and have secured strategic points of collection, preparation and distribution of these products" (Summary of Report on Meat Packing Industry, July 3, 1918, p. 13).

"The purposes of this combination, which for more than a generation has defied the law and escaped adequate punishments, are sufficiently clear from the history of the conspiracy and from the numerous documents already presented, namely:

"To monopolize and divide among the several interests the distribution of the food supply not only of the United States but of all countries which produce a food surplus, and, as a result of this monopolistic position,

"To extort excessive profits from the people not only of the United States but of a large part of the world" (Summary of Report on Meat Packing Industry, July 3, 1918, p. 40).

7. In July, 1919, the National Wholesale Grocers' Association of the United States began a proceeding before the Interstate Commerce Commission (I. C. C., Docket No. 10745), claiming that the meat packers were obtaining preferential services and rates from the carriers and that such

services and rates were discriminatory and constituted unfair competition. The meat packers intervened in said proceeding and themselves conducted the defense.

8. The report of the Federal Trade Commission and the data collected by the Commission were turned over to the Department of Justice, which in 1919 commenced grand jury proceedings in Chicago and New York with a view to determining whether the Government should proceed against the Packers by indictment or by action in equity, the evidence in the possession of the Department of Justice indicating that the large meat packers had violated the Sherman Anti-Trust Act (Hearings before Senate Committee on Agriculture and Forestry on S. 2199 and S. 2202, Part 4, p. 47; Hearing before House Committee on Agriculture on Meat Packer Legislation, Part 31, pp. 2327-8, 2349; Report of Federal Trade Commission to the United States Senate on Packers Consent Decree, Document 219, 68th Congress, 2d Session, p. 2).

9. While the grand jury proceedings were pending, representatives of the packers came to the Attorney-General for the purpose of negotiating a settlement of the differences which existed between the Government and the large meat packers as to their conduct under the Sherman Anti-Trust Law, (Hearing before Senate Committee on Agriculture and Forestry on S. 2199 and S. 2202, 66th Congress, 2d Session, pp. 37, 38; Hearings before the House Committee on Agriculture, 66th Congress, 2d Session, on Meat-Packer Legislation, Part 31, pp. 2311-2313).

As a result of these negotiations an agreement was entered into which resulted in the consent decree of February 27, 1920.

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